Supreme Court, U.S
FILED

00-1163 JAN 16 2001

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

HARRISTON LEE BASS, JR., M.D., Petitioner,
-vs.-
STATE OF NEVADA. BOARD OF MEDICAL EXAMINERS *Respondent*

On Petition for Writ of Certiorari
To the Supreme Court of the State of Nevada

PETITION FOR WRIT OF CERTIORARI

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Questions Presented for Review

1. Was Petitioner Dr. Bass (hereinafter referred to as "Bass"), a Board Certified African American surgeon, denied due process of law and equal protection under the law when he was denied a fair evidentiary hearing during a disciplinary process before the State of Nevada Board of Medical Examiners prior to the action being made public as required by NRS 233B.127 which is routinely provided to other physicians?

2. Was Bass denied due process and equal protection when he was charged with malpractice in a public disciplinary proceeding which proceedings specifically prohibited prehearing discovery and provided no substitute for the customary discovery afforded malpractice defendants and further denied Bass access to the medical records gathered by the Board of Medical Examiners which the Board routinely provided other defendants under their unwritten "open file" policy?

3. Was Bass denied due process when the malpractice charges against him have no support other than records which have been materially falsified and are the sole foundation for the Board's Expert opinion.?

4. Was Bass denied due process when the Board failed to recluse itself and refer the same to an impartial body?

LIST OF PARTIES

There are no parties not named in the caption.

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***Picker X-Ray Corporation v. Frerker*, 405 F.2d 916 (1969(** 8

STATE STATUTES

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CITATIONS OF THE OFFICIAL & UNOFFICIAL REPORTS OF THE OPINIONS & ORDERS ENTERED IN THE CASE BY COURTS OR ADMINISTRATIVE AGENCIES

Order of Reversal on Cross-Appeal and Order Dismissing Appeal entered by the Supreme Court of the State of Nevada in Case 30632 , *Bass v. State of Nevada Board of Medical Examiners* filed June 1, 2000 (Appendix pp. 1-34)

Findings of Fact, Conclusions of Law and Order of the Board of Medical Examiners of the State of Nevada entered in Case No. 9455, *In the Matter of the Complaint Against Harriston Lee Bass, Jr., M.D.*, filed December 29, 1993 (Appendix pp. 37-47)

Order Affirming Findings of Fact, of the Board of Medical Examiners of the State of Nevada entered in Case No. 9455, *In the Matter of the Complaint Against Harriston Lee Bass, Jr., M.D.*, filed September 20, 1996 (Appendix pp. 54-58)

Order on Petition for Judicial Review before the Eighth Judicial District Court of the State of Nevada, County of Clark, entered in Consolidated Cases Nos. 328764 and 329186 , *Bass v. Board of Medical Examiners* filed June 20, 1997 (Appendix pp. 72-73)

Order Denying Rehearing entered by the Supreme Court of the State of Nevada in Case 30632 , *Bass v. State of Nevada Board of Medical Examiners* filed September 18, 20000 (Appendix pp. 76-77)

CONCISE STATEMENT OF THE BASIS FOR JURISDICTION IN THIS COURT

The Order of Reversal on Cross-Appeal and Order dismissing Appeal of the Supreme Court of Nevada was entered on June 1, 2000. The order denying the petition for rehearing was filed on September 18, 2000. Justice Sandra Day O'Connor extended the time in which to file a Petition for Writ of Certiorari to and including January 16, 2001. The statute which confers jurisdiction on this court to review the judgment in question is 28 USC § 1257(a).

STATUTES INVOLVED IN THIS CASE

See Appendix pages 78 through 84.

In addition to the statutes set forth in said Appendix, NRS 233B.127 (3) provides:

No revocation, suspension, annulment or withdrawal of any license is lawful unless, prior to the institution of agency proceedings, the agency gave notice by certified mail to the licensee of facts or conduct which warrant the intended action, and the licensee was given an opportunity to show compliance with all lawful requirements for the retention of the license. If the agency finds that public health, safety or welfare imperatively require emergency action, and incorporates a finding to that effect in its order, summary suspension of a license may be ordered pending proceedings for revocation or other action. Such proceedings shall be promptly instituted and determined.

CONCISE STATEMENT OF CASE

Introduction

Facts concerning review question 1

The board conducted a secret peer review of Dr. Bass's care of Patients A and B. The peer review was accomplished in violation of NRS 233B.127 (3). which provides the Board give notice by certified mail to the licensee of facts or conduct which warrant the intended action, and the licensee be given an opportunity to show compliance with all lawful requirements for retention of his license. This procedure was not done. This was pointed out with regard to Patient A, to the board and the Supreme Court on or before 9/3/92 when Bass filed a Petition for Issuance of Writ of Prohibition in the Supreme Court of Nevada. This is the second time this violation has occurred. (Appendix 85-113). The complaint was later amended by the Board to include Patient B and again the peer review was conducted in secret.

Facts concerning review question 2

A complete set of medical records have still not been gathered nor provided to Bass. The Board's expert opinions were not provided to Bass prior to the time the hearing commenced. The medical records generated by the other providers rendering treatment to Patients A and B have been materially altered during the first several days, which would include transfer records. The facts concerning Patient A were pointed out to the Board and Supreme Court on 9/2/92. (Appendix 85-113). After 9/2/92, as indicated above, the complaint was amended to add allegations concerning Patient B, however, the Board continued to refuse to provide complete medical records or expert opinions on

either case prior to the commencement of hearing.

Facts concerning review question 3.

Upon detection by Bass of record falsification in both cases, disclosure was given to the Board and reviewing Court upon its first discovery by Bass and resulted in the matter being remanded to the Board by Judge Leavitt on 12/15/94. (Appendix 48-51) This matter was the primary focus of all proceedings before Judge Leavitt and the appellate proceedings before the Supreme Court of Nevada. See Appendix 117-118, 114-116, 132-142,143-148, affidavits of P. Joan O'Carroll, R.N. Clive O. Callender, M.D. and Henry Gong, M.D. 179-235.

Facts concerning review question 4.

The issue of bias with regard to Dr. Bass was addressed to the Board, Judge Lehman and the Nevada Supreme on or before 9/2/92 concerning Patient A. As indicated above, after this action, the complaint was amended by the Board to include allegations concerning his treatment of Patient B.

ARGUMENT

Introduction

As set forth in the Questions Presented for Review, the primary focus of all of the proceedings revolve around Question 3 which is the allegation of falsification of records in both cases. As set forth in Question 2, this falsification of records is complicated by the fact that due to lack of prehearing production of medical records and expert opinions, Dr. Bass was hindered from obtaining expert opinions to prove the falsification. As a result, the expert opinions he obtained which identify the defalcations have not been considered by the reviewing courts.

Defalcations

Bass has identified the defalcations of medical records and has presented this in prior briefing, however, the defalcations are so numerous and expansive, that it is not practical to duplicate the listing in this concise petition, other than to refer to the appendix which contains the expert affidavits of Joan O'Carroll, R.N. [Appendix 179-188; 189-192; 193-205] who reviewed the records as a medical records and quality assurance expert; Dr. Clive Callendar [Appendix 206-219] who reviewed the records from the viewpoint of a surgeon; and Dr. Henry Gong [Appendix 160-173] who reviewed Patient "A" from the viewpoint of a pulmonary expert. The significance of each of these affidavits are that they contain opinions that have not been considered by the Board of Medical Examiners nor the reviewing Courts based on the argument that they should have been presented earlier. However, Dr. Bass contends that they should have been considered fully for the reason that he had no opportunity to submit the records earlier

due to his deprivation of the records and opinions that the Board used against him prior to his hearing before them.

Dr. Bass was prohibited prehearing depositions and most records were not available since his care of the patients was stopped and only an incomplete set of records for UMC, Desert Springs Hospital and Womens Hospital was delivered just a few days before hearing. Subpoena power was the only power given Dr. Bass and his volunteer counsel and that was given one week before hearing commenced. Then Counsel for the Board, Larry Lessly, Esq., went so far as deeming it a "courtesy" to provide any materials at all to a physician subjected to serious disciplinary proceedings:

> Q. [Mr. Sorenson] Is there a reason you didn't deliver them [records] earlier?
>
> A. [Mr. Lessly] Mr. Sorenson, **you're not even entitled to them. I was doing you a courtesy**.
>
> (BME, Hrg. Transcript, Volume I, p. 35, emphasis provided)

These opinions are further significant for the reason that they reveal that the expert opinions utilized and solicited by the Board are meaningless as they are based upon untrustworthy records. NRS 51.135 provides:

> "A memorandum, report, record or compilation of data, in any form, of acts, events, conditions, opinions or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, all in the course of a

> regularly conducted activity, as shown by the testimony of the custodian or other qualified witness, is not inadmissible under the hearsay rule **unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness**." (emphasis provided)

In the case of Picker X-Ray Corporation v. Frerker, 405 F.2d 916 (1969), the Court held that written statements of a hospital business manager relating to an incident in the hospital were inadmissible as an exception to the hearsay rule where the statements were made after the manager knew that suit might result. See also Palmer v. Hoffman, 318 U.S. 109, 63 S.Ct. 477 (1943).

The question posed by the Nevada Supreme Court in their Order of Reversal [Appendix 1-34] was whether the findings of the Board were supported by clear and convincing evidence. Their order concluded that the findings were supported by clear and convincing evidence. Bass challenges their conclusion as he has been unable to find any case involving falsified medical records which would support a finding of clear and convincing evidence. In the case of Napue v. People of the State of Illinois, 360 U.S. 264, 79 S.Ct. 1173 (1995) this Court provided

> . . .that a conviction obtained through use of false evidence, known to be such by representatives of the State, must fall under the Fourteenth Amendment. . . .(citations omitted) The same result obtains when the State, although

not soliciting false evidence, allows it to go uncorrected when it appears. Alcorta v. State of Texas, 355 U.S. 28, 78 S.Ct. 103, 2 L.Ed.2d 9

The case of Barker v. Bledsoe, 85 F.R.D. 545 (1979) provides that destruction of evidence in a civil case is a violation of due process.

One of the most significant and blatant examples of falsification of records was the addition of **a new discharge summary**(dictated on 9/11/91) **after** Dr. McGregor's finding of no probable cause in his review of Dr. Bass' treatment of Patient A [Appendix 114-116]. The subsequent reviewers and witnesses who reviewed records concerning Patient A utilized these falsified records to base their opinions upon, utterly lacking the necessary foundation. The discharge summary is the **principal** record utilized by reviewers. In this case, the original "discharge summary" was removed and a new one substituted.

The admit slip (Appendix, 117-118) which demonstrated the attempts of Dr. Bass to transfer Patient "B. The Board of Medical Examiners was to have considered this admit slip on remand as ordered by the District Court [Appendix 48-51]. Instead, the Board in its Order Affirming Findings of Fact, Conclusions of Law and Order after Consideration of Additional Evidence [Appendix 54-58] found it to "have no relevance". They failed to consider why said admit slip containing the efforts of Dr. Bass to transfer and treat Patient B was not included in the original certified records used to prosecute him which resulted in the Order of Remand. The reason for its omission was that it was in

direct contradiction of the testimony relied on by the Board to arrive at its original conclusion that Dr. Bass didn't appreciate the seriousness of the patient's condition. This omitted admission slip belies all of that testimony as it reflects Dr. Bass' early efforts to transfer and operate on the patient's surgical abdomen.

In failing to consider this piece of evidence, the Board also had to substitute their own judgment for that of the expert pathologist who had reviewed the actual pathology of Patient "B" in timing the occurrence of the cecal volvulus in Patient "B" (Appendix, page 56), and therefore they ignored also the affidavit of Dr. Voss [Appendix 119-120].

Failure to Provide Due Process and Bias

There is no way to examine the record of all the administrative and court proceedings and conclude any differently than Dr. Bass was not afforded due process. He wasn't afforded **any** discovery prior to the hearing. To ask Dr. Bass to point out how that would have changed things is to place an improper and unreasonable burden upon him. He knows that he would not have had to subject his counsel to inquiring of the important physicians and nurses at the time of hearing without having adequate opportunity to prepare. The records brought forth with the subpoenas were only seen by counsel for Bass at the hearing, not ahead of time. There was no chance to engage a proper medical expert to review these records as the majority were coming in at the time of the hearing. All of Bass' numerous motions for discovery were denied. To expect a physician to defend a valuable property

right without discovery is beyond logical. The Nevada Supreme Court concluded that ". . .the failure to provide an opportunity to obtain discovery does not render an administrative hearing process unconstitutional." (Appendix 28). They also determined in that Order that Dr. Bass had been supplied a complete copy of the medical records and the opinions prior to the commencement of the hearing. This conclusion is clearly erroneous and not based upon any evidence in the record. Dr. Bass was clearly deprived of due process in the hearing when he was forced to obtain the medical records simultaneously with trying to proceed through the hearing and was of course afforded no opportunity to obtain expert to rebut that evidence. As indicated in Goldberg v. Kelly, 397 U.S.254, 90 S.Ct. 1011, 25 L.Ed.2d 287 (1970),

> In almost every setting where important decisions turn on questions of fact, due process requires an opportunity to confront and cross examine. [citations omitted]
>
> . . . .
>
> Certain principles have remained relatively immutable in our jurisprudence. One of these is that where governmental action seriously injures an individual, and the reasonableness of the action depends on fact findings, the evidence used to prove the Government's case must be disclosed to the individual so that he has an opportunity to show that it is untrue.

If in the case of Bass, the physician is denied the right to review the documentation and opinions prior to the hearing as the Board did, he is effectively denied his right to an opportunity to confront and cross examine.

Mishler v. State, Bd. of Med. Examiners, 109 Nev. 287, 294, 849 P.2d 291 (1993), stated in part as follows:

> The record does not state whether the Board had the records in its possession or whether the records were destroyed. In either case, the Board controlled, or once had controlled, access to the records. Thus, we conclude that the Board obstructed Dr. Mishler's access to the records. In three recent civil actions, this court has noted the obligation of a party who intends to rely on certain evidence to marshal and preserve it for the benefit of the opposing party. Where a party fails to do so, that party must suffer the prejudice from the absence of the evidence. *See* Stubli v. Bid D International Trucks, 107 Nev. 309, 810 P.2d 785 (1991); Judson v. Camelot Food, Inc., 104 Nev. 325, 756 P.2d 1198 (1988); Fire Ins. Exchange v. Zenith Radio Corp., 103 Nev. 648, 747 P.2d 911 (1987). *Stubli* set forth a non-exhaustive list of factors which a court may consider when deciding whether dismissal of the complaint is appropriate.
>
> These facts are as follows: (1) the degree of willfulness of the

> offending party; (2) the extent to which the non-offending party would be prejudiced by a lesser sanction;(3) the severity of the sanction of the dismissal relative to the severity of the discovery abuse; (4) whether any evidence has been irreparably lost; (5) the policy favoring adjudication on the merits; (6) whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney; and (7) the need to deter both the parties and future litigants from similar abuses.

The Board of Medical Examiner's conduct as demonstrated in the record of this case is rife with bias and prejudice against Dr. Bass. The Board of Medical Examiners has refused to consider any favorable evidence of Dr. Bass. When they initially denied Bass' motion for disqualification, the same was done immediately, without opposition and without any independent consideration. Dr. Bass attempted to immediately address that bias through a Petition for Writ of Prohibition and/or for an Alternative Writ of Mandate filed in the Nevada State Supreme Court on September 4, 1992 in Case No. 23567.(Appendix 85-113) That Petition was denied by this Court on September 14, 1992 (Appendix 34-35) in an order which stated:

> "We have considered the petition on file herein, and we are not satisfied that this court's intervention by way of extraordinary writ is warranted at this time. Accordingly, we deny the petition."

Other Items Which Demonstrate Bias

•Failure to have the medical records gathered and evaluated by Qualified Assurance personnel.

•Failure to gather the items labeled as "peer review" materials which contained important medical evidence and would have been the most efficient way to evaluate the care of these patients and evaluate the care received by all medical providers involved--not just Dr. Bass.

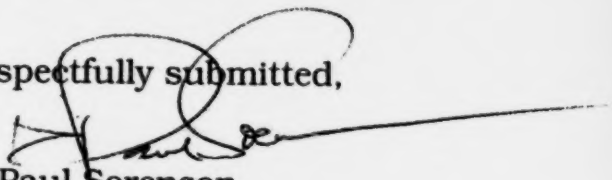
•Failure to investigate record defalcations after Dr. Bass uncovered and pointed them out to the B.M.E.

•The actions of the B.M.E. in its first disciplinary action against Dr. Bass was the impetus behind Dr. Bass' initial motion to disqualify this Board.

CONCLUSION

The Court should grant this petition for writ of certiorari directing dismissal of the complaints filed against Dr. Bass by the Board of Medical Examiners.

Respectfully submitted,



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